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**MOTION FILED APR 1 1960**

**No. 207 59**

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**IN THE  
Supreme Court of the United States**

**OCTOBER TERM, 1959**

**FRANK COSTELLO, *Petitioner,***

**v.**

**UNITED STATES OF AMERICA**

**On Petition for a Writ of Certiorari to the United States Court  
of Appeals for the Second Circuit**

**MOTION FOR LEAVE TO AMEND PETITION FOR A WRIT  
OF CERTIORARI AND AMENDMENT TO PETITION**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1959

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No. 802

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FRANK COSTELLO, *Petitioner*,

v.

UNITED STATES OF AMERICA

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On Petition for a Writ of Certiorari to the United States Court  
of Appeals for the Second Circuit

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**MOTION FOR LEAVE TO AMEND PETITION FOR  
CERTIORARI**

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Petitioner respectfully moves this Court for leave to amend the petition for certiorari filed herein on March 18, 1960, on the following grounds:

1. The Solicitor General filed a petition for certiorari in the case of *United States v. Lucchese*, No. 789, on March 14, 1960. This petition recites that denaturalization proceedings against Lucchese were dismissed "without prejudice" because the government had failed to file an affidavit of good cause contemporaneously with the complaint. The Court of Appeals for the Second Circuit reversed but was in turn reversed by this Court, which ordered the case "remanded to

the District Court with directions to dismiss" the complaint. 356 U.S. 256.

2. Upon remand the District Court felt constrained by the mandate of this Court to enter an order of dismissal which did not specify whether it was with or without prejudice. The government moved for resettlement of the dismissal order. When this motion was denied, the government appealed. On October 15, 1959, the Court of Appeals for the Second Circuit dismissed the government's appeal. The government obtained an extension of time for filing a petition for a writ of certiorari to and including March 14, 1960.

3. Prior denaturalization proceedings against petitioner Costello were dismissed "without prejudice" because the government's evidence and affidavit of good cause were tainted by wiretapping. 145 F. Supp. 892. The Court of Appeals for the Second Circuit reversed but was in turn reversed by this Court because the affidavit of good cause had not been filed contemporaneously with the complaint. 356 U.S. 256. This case and the *Lucchese* case were companion cases, reversed with identical directions. Here, as in the *Lucchese* case, the District Court felt constrained to enter an order of dismissal which did not specify whether it was with or without prejudice.

4. Instead of taking an appeal, however, the government filed a new complaint seeking petitioner Costello's denaturalization on grounds similar to but narrower than those alleged in the original complaint. Petitioner took the position that these proceedings were barred by principles of *res judicata*. He relied upon Rule 41(b) of the Federal Rules of Civil Procedure, which provides that any involuntary dismissal "other than a

dismissal for lack of jurisdiction or for improper venue" operates as an adjudication on the merits unless the order otherwise specifies. This position was rejected by the District Court, which entered a judgment revoking petitioner's naturalization. The Court of Appeals affirmed on February 17, 1960.

5. The Solicitor General's petition in the *Lucchese* case asks this Court to grant certiorari in the event that it grants certiorari as to the *res judicata* issue in the *Costello* case. This petition, however, did not come to the attention of counsel for petitioner Costello until March 29, 1960. The *Costello* petition was filed on March 18, 1960, and did not raise the *res judicata* issue.

6. The *Lucchese* petition indicates that the nature and effect of dismissals entered pursuant to the mandate of a higher court raise serious questions which should be resolved by this Court. Since the petition in the instant case was not due until May 17, 1960, there can be no jurisdictional problem in permitting amendment by adding an additional question at this time. Petitioner believes that it would be in the interest of justice to permit amendment of his petition by adding the matter attached as an appendix to this motion.

WHEREFORE, it is respectfully submitted that the present motion for leave to amend the petition for a writ of certiorari should be granted.

EDWARD BENNETT WILLIAMS,  
MORRIS SHILENSKY,  
AGNES A. NEILL,  
VINCENT J. FULLER,  
*Counsel for Petitioner.*

April, 1960.

# APPENDIX

APPENDIX

**QUESTIONS PRESENTED**

5. Whether the present proceedings are barred by entry of an order dismissing prior denaturalization proceedings against petitioner, which was entered pursuant to the mandate of this Court and which did not specify whether it was with or without prejudice.

**REASONS FOR GRANTING THE WRIT**

5. In dismissing prior denaturalization proceedings against petitioner, Judge Palmieri expressly provided that the case was dismissed "without prejudice to the government's initiating it anew on the very same grounds." 145 F. Supp. at 897. The Court of Appeals reversed but was in turn reversed by this Court, which held that an affidavit of good cause is a prerequisite to the initiation of denaturalization proceedings and that the affidavit must be filed with the complaint. This Court remanded the case to the District Court with directions "to dismiss the complaint." 356 U.S. 256.

Upon remand the District Court felt constrained by the mandate of this Court to enter an order of dismissal which did not specify whether it was with or without prejudice. The government presented a proposed order for dismissal "without prejudice," but it took no appeal from the court's refusal to sign this order. Instead, the government filed a new complaint against petitioner, which contained allegations very similar to the allegations of the original complaint.

Petitioner urged that these proceedings were barred by principles of *res judicata*. He relied upon Rule 41(b) of the Federal Rules of Civil Procedure, which provides that any involuntary dismissal "other than a dismissal for lack of jurisdiction or for improper venue" operates as

an adjudication on the merits unless the order otherwise specifies. The District Court rejected this contention, on the ground that the prior proceedings had been dismissed for failure to comply with "a jurisdictional requirement" (R. 34).

The Court of Appeals likewise rejected this contention, but on somewhat different grounds. It refused to hold that the District Court lacked jurisdiction in the first proceedings (App. 11a-12a). Instead it concluded that Rule 41(b) does not apply to dismissals entered pursuant to the mandate of an appellate court (App. 12a-13a).

On March 14, 1960, the Solicitor General filed a petition for certiorari in the case of *United States v. Lucchese*, No. 789. The District Court dismissed a complaint seeking Lucchese's denaturalization because the affidavit of good cause had not been filed contemporaneously with the complaint. The Court of Appeals for the Second Circuit reversed but was in turn reversed by this Court. 356 U.S. 256. The *Costello* case and the *Lucchese* case were companion cases, reversed with identical directions. Just as in *Costello*, the District Court in the *Lucchese* case felt constrained to enter an order of dismissal which did not specify whether it was with or without prejudice.

In the *Lucchese* case, however, the government took an appeal which was dismissed *per curiam* on October 15, 1959. The government obtained an extension of the time for filing a petition for certiorari to and including March 14, 1960. On this date the Solicitor General filed a petition asking that a writ of certiorari issue in the *Lucchese* case if this Court should grant certiorari as to the *res judicata* issue in the *Costello* case.

The Solicitor General's petition demonstrates that the nature and effect of dismissals entered pursuant to the mandate of a higher court raise serious questions in the field of federal civil procedure. It is apparent that these questions should be resolved by this Court.

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